# The Burger Court Opinion Writing Database

## *Gilmore v. Montgomery*

417 U.S. 556 (1974)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University




Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 23, 1974

Re: 72-1517 - Gilmore v. City of Montgomery, Ala.

MEMORANDUM TO THE CONFERENCE:

With my contemplated absence for nine or ten days, I have asked Harry to do a memo on the above case. There is no clear-cut consensus as yet. The responses to that memo will afford a basis for a disposition and final assignment.

Regards,

WEB

Supreme Court of the United States
Washington, D.C.

February 12, 1974

CHAMBERS OF
THE CHIEF JUSTICE

**PERSONAL**

Re: 72-1517 - Gilmore v. City of Montgomery, Alabama

Dear Byron:

I have not responded to your memo in which you comment on Bill Brennan's memo of February 5, 1974. The reason is that I am awaiting Harry's memo.

Everyone is, of course, free to express views on pending matters but the assignment--for--memo process has proven very useful in cases, like this one, in which no majority view crystalized in the Conference. At the moment I might come out close to what you suggest.

The memo assignment procedure focuses primary responsibility in one person and as in the "oil spill" case, and others, last term it afforded a medium for accommodation that can produce a unanimous opinion.

Having asked Harry to take this burden, as with Bill Douglas and others in some of these "cloudy" cases, I will defer comment until Harry produces his analysis.

I think there is a good chance that a consensus will develop here.

Regards, WEB

Mr. Justice White

cc: Mr. Justice Blackmun

Harry I thought this was indicated in view of the seeming "rejection" of my memo at this very [illegible] I could [illegible]

added the abortion cases - but not to DAW! WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 22, 1974

Re: 72-1517 - Gilmore v. City of Montgomery

Dear Harry:

I am in general agreement with your memorandum of May 20 and will join an opinion along those lines.

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 29, 1974

Re: 72-1517 - Gilmore v. Montgomery

Dear Harry:

Please join me.

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1974

PERSONAL

Re: No. 72-1517 - Gilmore v. City of Montgomery, Alabama

Dear Harry:

If needed, this will serve as a renewed "concur" in the above.

Regards,

Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 13, 1974

Re: 72-1517 - Gilmore v. City of Montgomery

Dear Harry:

Your footnote is acceptable to me.

Regards,

WEB

Mr. Justice Blackmun

CC: Mr. Justice Stewart
Mr. Justice Powell
Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 6, 1974

Dear Bill:

In 72-1517, Gilmore v. City of Montgomery please join me in your memo of Feb. 5, 1974.

WILLIAM O. DOUGLAS

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 6, 1974

Dear Byron:

Please join me in your concurring opinion in 72-1517, GILMORE v. CITY OF MONTGOMERY.

WILLIAM O. DOUGLAS

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 22, 1974

MEMORANDUM TO THE CONFERENCE

RE: No. 72-1517 Gilmore v. City of Montgomery

I note on the assignment sheet that the Chief Justice plans to circulate a memorandum in the above and await responses before assigning the opinion. I have already begun work on a similar memorandum and have discovered that the record on file here does not contain all of the material (depositions, settlement agreement, etc.) relevant to the history of the case which apparently begins with a complaint filed over fourteen years ago on December 22, 1958. I have, therefore, asked the Clerk to ask the parties to supplement the record and will complete my memorandum after its receipt.

W.J.B.Jr.

Circulated
2-5-74

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 72-1517

| | |
|---|---|
| Georgia Theresa Gilmore et al., Petitioners, *v.* City of Montgomery, Alabama, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. |

[February —, 1974]

Memorandum of MR. JUSTICE BRENNAN.

Petitioners filed this lawsuit in December 1958 to desegregate the public parks of Montgomery, Alabama. On September 9, 1959, the District Court entered a judgment that declared unconstitutional a 1957 ordinance that segregated whites and blacks in their use of the parks, and enjoined respondents from enforcing the ordinance "or any custom, practice, policy or usage which may require [petitioners] or any other Negroes similarly situated to submit to enforced segregation solely because of race or color in their use of any [Montgomery] public parks . . . ." 176 F. Supp. 776 (1959). The Court of Appeals for the Fifth Circuit affirmed but directed that the judgment expressly provide "that the district court will retain jurisdiction of the cause for such reasonably long period as may appear to be advisable, with the right and authority to enter such orders and decrees as may hereafter appear meet and proper . . . ." 277 F. 2d 364 (1960). In April 1964 an order was entered closing the case without prejudice to its reinstatement upon petition of any party.

In a related proceeding, the District Court on July 20, 1970, held that an agreement between the city of Montgomery and the Young Men's Christian Association of

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 28, 1974

RE: No. 72-1517 Gilmore v. City of Montgomery

Dear Harry:

It's particularly generous of you to consider these comments at this crowded time. I venture several with the hope that we can make yours a Court opinion that I can join without filing anything.

(1) The basis for the conclusions you reach is particularly sound against the background of an understanding of Montgomery's attempts to evade the federal decree requiring desegregation of the city's recreational facilities. I therefore hope that you might track, or even adopt, the more detailed and chronological background to this dispute that takes up pages 1 - 8 of my memo.

(2) I suggest that the example on page 12, lines 3 - 6 of your memorandum, of a non-exclusive use by private schools that might contravene the school desegregation decree would be clarified by the addition after "tournament" on page 12, line 5, of "conducted on public recreational facilities."

(3) I read your discussion of state action on pages 13 - 15, with which I agree, as equally applicable to a northern city with

no history of de jure segregation of its parks. But the de jure context of this case has, I think, a significance to our decision that requires emphasis. Let me make my point with an illustration of the differing results, as I see them, between de jure and a de facto situation. Suppose Montomery had in the past scheduled the use of tennis courts on a segregated basis. Then, after issuance of the park desegregation order, the city simply abandoned scheduling. That could well result in assuring continued segregated use by all-white groups. In that circumstance, I would think a federal court might properly follow the reasoning of Green in the school cases and hold that the city had an "affirmative duty" to continue scheduling, but on a nondiscriminatory basis. This "affirmative duty", however, might not be properly decreed in the case of another city, where, although the tennis courts had almost always been used by all-white groups, there had never been an attempt by the city to effect segregated use through scheduling.

This prompts my suggestion that there be added on page 15, before the paragraph beginning "[W]e close with this word of caution," something which highlights the difference. I can best make my point with the following draft language that I know you can improve:

> "Moreover, since the 'Motion for Further Relief," with which this action was commenced, invoked the District Court's remedial power to fashion remedies to require dismantlement of de jure segregated parks and recreational programs, the

District Court, in evaluating the significance of the city's involvement in the private discrimination alleged, should also determine the effect that the utilization of municipal facilities by these private groups may have in hindering desegregation under the outstanding parks desegregation order."

In the same vein, another paragraph might be added to clear up some ambiguity in the distinction between treatment of simply all-white groups and all-white groups with a racially exclusionary admissions policy, depending upon whether they are school or non-school groups:

"Consideration should also be given to the question whether whether it is proper to distinguish between simply all-white groups and all-white groups with a racially exclusionary admissions policy for purposes of relief supplementary to the 1959 parks desegregation order.*/

Perhaps the following footnote from my footnote 9, page 15 would also help:

*/ If that distinction is thought to be appropriate, the District Court should clarify what evidence is relied upon to conclude that private organizations with racially discriminatory admissions policies have in fact uti[illegible] municipal recreational facilities.

An examination of the record reveals: On December 1, 1971, the parties had filed an "Agreement for Submission of case," reciting that they agreed "for the case to be

submitted to the Court on the pleadings filed by the parties, the answers to interrogatories heretofore filed by Defendants, and upon the Fact Stipulation as attached hereto." The only interrogatories propounded in connection with the "Motion for Further Relief" were propounded to respondent Henry M. Andrews, Jr., Superintendent of the Parks and Recreational Program,and neither his answers nor anything contained in the Fact Stipulation, address a practice of respondents with respect to the use of facilities by the nonschool private clubs and groups. There is, however, testimony on that subject in the depositions of the several respondents taken in the earlier proceeding on the amended complaint that led to the settlement agreement. Testimony as to the use of facilities by an allegedly private segregated citywide Dixie Youth baseball league appears in the depositions of Joseph E. Marshall and Durwood Lynn Bozeman, the City's Athletic Supervisor. Mr. Marshall's deposition states that, while the Dixie Youth teams at one time were officially segregated, they removed racial restrictions a number of years ago "[r]ealizing that many of [the] leagues used municipal facilities" and that invitations to join the leagues are issued to all children in the public schools, though all of the directors of the league are white. Mr. Bozeman's deposition testifies that

the city supplies these leagues with playing facilities, pays for lighting, and gives each of them a dozen balls, chest protectors, leg guards, masks, mitts, and eight bats. Mr. Bozeman's deposition also covers the operations of the private allegedly predominately white Babe Ruth league and a public Negro Babe Ruth league, and discusses the operations of allegedly segregated church softball leagues.

(4) I gather that you agree that "exclusive" use of recreational facilities, as you define it, by private-non-school groups with segregated admissions policies would be impermissible as a violation of the parks decree for the same reason that such use by private-school groups would be a violation of both the parks and school desegregation decrees. In the circumstances, since the use of facilities and equipment by the Dixie Youth, Babe Ruth and all-white Church leagues would appear to be an "exclusive" use by private groups, should it not be more explicitly stated that "exclusive" use by such groups would violate the parks decree?

(5) In order to provide the lower courts with a crystal clear understanding of our judgment, would it be helpful to substitute for the last paragraph of your opinion something like the following:

"Accordingly, we affirm the judgment of the Court of Appeals insofar as it affirms paragraphs one and two of the District Court's order as applied to prevent the city from permitting

"exclusive" use to be made of its recreational facilities by private school groups. The judgment of the Court of Appeals is vacated to the extent that it reverses paragraphs one and two as applied to prohibit "non-exclusive" use of such facilities by private school groups, and is also vacated insofar as it reverses paragraphs three and four relating to segregated nonschool groups, clubs, and organizations. To the extent that the Court of Appeals' judgment is vacated, we direct the entry of a new judgment that remands to the District Court for further proceedings consistent with this opinion."

If that change is made, I suppose, for consistency, that mention should be made of the actual decretal provisions of the District Court's judgment earlier in the text of your opinion. See, e.g. my footnote 3, at page 4 of my memorandum.

Sincerely,

Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 5, 1974

RE: No. 72-1517 Gilmore v. City of Montgomery

Dear Harry:

You were very generous to adapt my suggestions in your revision. I therefore see no reason to write and am happy to join your revised opinion.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 5, 1974

No. 72-1517--Gilmore v. City of Montgomery

Memorandum to the Conference:

Harry tells me that the changes made at my suggestion have not been acceptable to some who joined his original circulation. He is therefore revising his present draft to delete some matters added to meet my suggestions. Accordingly, I shall in due course circulate a separate opinion.

Sincerely,

Bill

Undated
6/10?

No. 72-1517 Georgia Theresa Gilmore, et al. v. City of Montgomery, Alabama, et al.

MR. JUSTICE BRENNAN, concurring.

The Court today affirms the Court of Appeals' judgment insofar as it affirmed paragraphs 1 and 2 of the District Court's order, ante, p. 6, n.6, as applied to enjoin respondents from permitting private segregated school groups to make "exclusive use" of Montgomery's recreational facilities. Unlike the Court, I do not think that remand is required for a determination whether certain "nonexclusive uses" by segregated school groups should also be proscribed, for I would also sustain paragraphs 1 and 2 insofar as they enjoin any school-sponsored or directed uses of the city recreational facilities that enable private segregated schools to duplicate public school operations at public expense.

Norwood v. Harrison, 413 U.S. 455 (1973), struck down a State program which loaned textbooks to students without regard to whether the students attended private schools with racially discriminatory policies. Finding that free textbooks, like tuition grants to private school students, were a "form of financial assistance inuring to the benefit of the private schools themselves," id., at 464, Norwood held that the State could not, consistent with the Equal Protection Clause, grant aid that had "a significant tendency to facilitate, reinforce, and support private discrimination." Ibid., at 466. The reasoning of Norwood compels the conclusion that Montgomery must be enjoined from providing any assistance which financially benefits Montgomery's private segregated schools, except, of course, "such necessities of life as electricity, water, police and fire protection," Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972). The unconstitutionality is thus obvious of such "nonexclusive uses" of municipal recreational facilities as the use of a portion of a park for a segregated school's gym classes or organized athletic contests. By making its municipal facilities available to private segregated schools for such activities, Montgomery unconstitutionally subsidizes its private segregated schools by relieving them of the expense of maintaining their own facilities.

Whether it is necessary to go even further and enjoin all school-sponsored and directed nonexclusive uses of municipal recreational facilities -- as would my Brothers White and Douglas -- is a question I would have the

Circulated
6-11-74

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 72-1517

| | |
|---|---|
| Georgia Theresa Gilmore et al., Petitioners, *v.* City of Montgomery, Alabama, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. |

[June —, 1974]

MR. JUSTICE BRENNAN, concurring.

The Court today affirms the Court of Appeals' judgment insofar as it affirmed paragraphs 1 and 2 of the District Court's order, *ante,* p. 6, n. 6, as applied to enjoin respondents from permitting private segregated *school* groups to make "exclusive use" of Montgomery's recreational facilities. Unlike the Court, I do not think that remand is required for a determination whether certain "nonexclusive uses" by segregated school groups should also be proscribed, for I would also sustain paragraphs 1 and 2 insofar as they enjoin any school-sponsored or directed uses of the city recreational facilities that enable private segregated schools to duplicate public school operations at public expense.

*Norwood* v. *Harrison,* 413 U. S. 455 (1973), struck down a State program which loaned textbooks to students without regard to whether the students attended private schools with racially discriminatory policies. Finding that free textbooks, like tuition grants to private school students, were a "form of financial assistance inuring to the benefit of the private schools themselves," *id.,* at 464, *Norwood* held that the State could not, consistent with the Equal Protection Clause, grant aid that had "a significant tendency to facilitate, reinforce, and support private

Circulated
6-13-74

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 72–1517

Georgia Theresa Gilmore et al., Petitioners, *v.* City of Montgomery, Alabama, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1974]

MR. JUSTICE BRENNAN, concurring.

The Court today affirms the Court of Appeals' judgment insofar as it affirmed paragraphs 1 and 2 of the District Court's order, *ante*, p. 6, n. 6, as applied to enjoin respondents from permitting private segregated *school* groups to make "exclusive use" of Montgomery's recreational facilities. Unlike the Court, I do not think that remand is required for a determination whether certain "nonexclusive uses" by segregated *school* groups should also be proscribed, for I would also sustain paragraphs 1 and 2 insofar as they enjoin any school-sponsored or directed uses of the city recreational facilities that enable private segregated schools to duplicate public school operations at public expense.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 19, 1974

Re: No. 72-1517, Gilmore v. City of Montgomery

Dear Bill,

I shall await Harry Blackmun's circulation before coming to rest in this case.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 27, 1974

72-1517, Gilmore v. Montgomery

Dear Harry,

I agree with your memorandum in this case, as recirculated today.

Sincerely yours,

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 12, 1974

72-1517 - Gilmore v. Montgomery

Dear Harry,

Your proposed new footnote is acceptable to me.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to The Chief Justice
Mr. Justice Powell
Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 11, 1974

Re: No. 72-1517 - Gilmore v. City of Montgomery

Dear Bill:

It seems to me that as a remedial matter in connection with prior school desegregation decrees and wholly aside from litigation focusing on parks and recreational facilities, the District Court could properly forbid private, all-white schools from using public recreational facilities for school-sponsored activities that are part of the educational program of the school, whether or not the use is in common with others. To this extent, I see no reason for further proceedings in the District Court except to make sure that the District Court's decree reaches this far. At the same time, it could be made clear that use of public recreational facilities by individual children or groups of children, as members of the public but not as part of the educational functions of a white school, is not forbidden. Whether a majority would support this disposition with respect to the private schools, I do not know.

You also remand the case to the District Court to reconsider the use of public recreational facilities by private groups with segregated membership policies against the background of the District Court's prior and pending efforts to complete the task of desegregating the city's recreational facilities. This clearly rejects Judge Johnson's judgment that the city may not permit the temporary, exclusive use of city recreational facilities by private clubs with racial membership requirements, without regard to whether such prohibition is essential to an effective remedy for an official segregation policy. I am frank to say that I am not at rest on this issue. I don't think that Moose Lodge necessarily controls. The question there concerned the significance of the grant of a license as part of a regulatory program. No public subsidy was involved; and without the regulatory regime, the club, like others, could have sold liquor to its members. In terms of state involvement in segregation, there is something fundamentally different where the city furnishes recreational facilities to a club that otherwise would not and likely could not have their use. At the same time, if the use of "recreational facilities" may be forbidden, the same could not be said with respect to renting or permitting the use of public facilities for communicative, speech-related purposes or

with respect to furnishing ordinary municipal services such as police and fire protection. Of course, I would prefer your suggested disposition to an affirmance of the Court of Appeals judgment.

Sincerely,

Mr. Justice Brennan

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 23, 1974

Re: No. 72-1517 - Gilmore v. City of Montgomery

Dear Harry:

I would prefer to affirm the District Court now insofar as its decree bars private schools not only from the exclusive use of city recreational facilities but also from using them for organized school purposes in common with others. Otherwise I am agreeable to the remand. My preference, however, would also be to omit the addendum to the memorandum beginning on page fifteen thereof.

Sincerely,

Byron

Mr. Justice Blackmun

Copies to Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: 6-6-74

Recirculated: _____

No. 72-1517 - Gilmore v. City of Montgomery

Mr. Justice White, concurring.

I concur in the Court's judgment except that I would sustain the District Court not only to the extent the Court of Appeals affirmed its judgment but also insofar as it would bar the use of city-owned recreation facilities by students from segregated schools for events or occasions that are part of the school curriculum or organized and arranged by the school as part of its own program. I see no difference of substance between this type of use and the exclusive use that the majority agrees may not be permitted consistent with the Equal Protection Clause.

It may be useful also to emphasize that there is very plainly state action of some sort involved in the leasing, rental or extending the use of scarce city-owned recreation facilities to ~~church~~ private schools or other private groups. The facilities belong to the city, an arm of the State; the decision to lease or otherwise permit the use of the facilities is deliberately made by the city; and it is fair to assume that those who enter into these transactions on behalf of the city know the nature of the use and the character of the group to whom use is being extended. For Fourteenth Amendment purposes, the question is not whether there is state action but whether the conceded action by the city, and hence by the State, is such that the State must be deemed to have denied the equal protection of the laws. In other words, by permitting a segregated school or group to use city-owned facilities, has the State furnished such aid to the group's segregated policies or become so involved in them that the State itself may fairly be said to have denied equal protection? Under Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), it is perfectly clear that to violate the

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: White, J.

Circulated: _____

Recirculated: 6-7-74

# SUPREME COURT OF THE UNITED STATES

No. 72-1517

Georgia Theresa Gilmore et al., Petitioners, *v.* City of Montgomery, Alabama, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1974]

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS joins, concurring.

I concur in the Court's judgment except that I would sustain the District Court not only to the extent the Court of Appeals affirmed its judgment but also insofar as it would bar the use of city-owned recreation facilities by students from segregated schools for events or occasions that are part of the school curriculum or organized and arranged by the school as part of its own program. I see no difference of substance between this type of use and the exclusive use that the majority agrees may not be permitted consistent with the Equal Protection Clause.

It may be useful also to emphasize that there is very plainly state action of some sort involved in the leasing, rental or extending the use of scarce city-owned recreation facilities to private schools or other private groups. The facilities belong to the city, an arm of the State; the decision to lease or otherwise permit the use of the facilities is deliberately made by the city; and it is fair to assume that those who enter into these transactions on behalf of the city know the nature of the use and the character of the group to whom use is being extended. For Fourteenth Amendment purposes, the question is not whether there is state action but whether the con-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 6, 1974

Re: No. 72-1517 -- Gilmore et al. v. Montgomery, Alabama

Dear Bill:

I am in agreement with your memorandum in this case.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 12, 1974

Re: No. 72-1517 -- Gilmore v. City of Montgomery

Dear Bill:

I agree with much of Byron's letter in this case. Frankly, I would simply reinstate Johnson's order.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

6/12/73

No. 72-1517 Georgia Theresa Gilmore, et al. v. City of Montgomery, Alabama, et al.

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

Although I am in general agreement with the sentiments expressed in my Brother White's opinion, I wish to address certain other considerations which I believe should govern appellate review of the order entered by the District Court in this case. That court, which has an unfortunately longstandir and by now intimate familiarity with the problems presented in this case, issued the supplemental relief at issue here in response to a motion by petitioners bringing to its attention the practice of the City of Montgomery of allowing private schools and clubs with racially discriminatory admissions policies or with segregated memberships to use football facilities maintained at city expense. For all that appears in the record, this practice, and the related practice of allowing private segregated schools and clubs to use baseball fields, basketball courts, and athletic equipment maintained and purchased at city expense, were the only problems before the District Court and the only problems intended to be cured by its supplemental order.

Both the Court of Appeals and this Court, rather than limiting their review of the order in conformity with its intended scope, have sought to project the order to a wide variety of problems not before the District Court--including so-called non-exclusive access by private school groups or nonschool organizations to zoos, museums, parks, nature walks, and other similar municipal facilities--and to review the order as so projected.

By so rendering an advisory opinion on matters never presented to the District Court, the Court of Appeals and this Court have attempted to solve in the abstract problems which, in my view, should more appropriately be entrusted in large measure to the sound discretion of the District Court judge who has lived with this case for so many years and who has a much better appreciation both of the extent to which these other matters are actual problems in the City of Montgomery and of the need for injunctive relief to resolve these problems to the extent they exist.

Since I find the District Court's order a permissible and appropriate remedy for the instances of unconstitutional state action brought to its attention, I would sustain and reinstate its order in its entirety.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Whit
Mr. Justice Blac
Mr. Justice Powe
Mr. Justice Rehn

1st DRAFT

From: Marshall, J.

# SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 72-1517

Recirculated: JUN 1

| | |
|---|---|
| Georgia Theresa Gilmore et al., Petitioners *v.* City of Montgomery, Alabama, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. |

[June —, 1974]

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

Although I am in general agreement with the sentiments expressed in my Brother WHITE's opinion, I wish to address certain other considerations which I believe should govern appellate review of the order entered by the District Court in this case. That court, which has an unfortunately longstanding and by now intimate familiarity with the problems presented in this case, issued the supplemental relief at issue here in response to a motion by petitioners bringing to its attention the practice of the city of Montgomery of allowing private schools and clubs with racially discriminatory admissions policies or with segregated memberships to use football facilities maintained at city expense. For all that appears in the record, this practice, and the related practice of allowing private segregated schools and clubs to use baseball fields, basketball courts, and athletic equipment maintained and purchased at city expense, were the only problems before the District Court and the only problems intended to be cured by its supplemental order.

Both the Court of Appeals and this Court, rather than limiting their review of the order in conformity with its intended scope, have sought to project the order to a

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 20, 1974

MEMORANDUM TO THE CONFERENCE

Re: No. 72-1517 - Gilmore v. City of Montgomery

I am not entirely sure of my posture with respect to an opinion for this case. With his note of January 23 to the Conference, the Chief asked me to prepare a memorandum. Then, on February 5, Bill Brennan circulated his conclusions. I do not wish to "steal his thunder."

The enclosed, however, represents my conclusions, and it is submitted to you for such consideration as it may deserve.

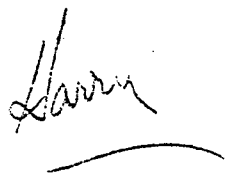
I differ with Bill in some details. First, I feel that the Court of Appeals' "exclusive" use approach is confusing and needs clarification. Bill, I believe, would hold that "exclusive" use encompasses any school-sponsored or directed utilization of municipal recreation facilities that 'enable[s] the private school to duplicate public school operations at public expense.'" (Draft at 10, n. 7.) For me, a problem with this is that the definition does not include "exclusive" use by private groups, which, I think, can be most questionable upon an appropriate showing of state action.

It would perhaps also define as "exclusive" situations that, in normal understanding, would be thought "nonexclusive" or "in common with others." For example, Bill's definition might label as "exclusive" the attendance by a private school science club at a science conference in the city museum open to science dubs at all area schools. It would be my understanding that this attendance would be a "nonexclusive" use. This does not

mean that the attendance would necessarily be constitutionally permitted, only that it should not be called "exclusive." This narrower definition, I believe, is what the CA really intended, since, in the record before it, it was dealing with the use of stadia and playing fields.

Because of these difficulties, I have included a more extended discussion of the CA's exclusive use holding with respect to schools. Bill would affirm this part of the judgment (draft at 15-16), but would not develop it in detail because respondents did not cross-petition (draft, footnotes 6 and 8). I do not think we should accept it as it stands, and I therefore believe it is necessary to clarify it. This can be done only by discussing the entire CA judgment. Prudence also dictates this treatment, to my mind, because this type of case is likely to arise in many other circumstances, and it is important to have a clear statement on what is and what is not constitutionally acceptable in this area. Moreover, the discussion of the "exclusive" aspects of the case should provide guidance to district courts in developing further the nonexclusive and private clubs parts of this case.

Second, I have tried to develop in more detail, somewhat along the lines Byron suggested, the areas that the District Court should consider on remand. This will encourage, hopefully, a mature consideration in this case and well developed sets of findings and conclusions in other cases that we might be asked to review later.



To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: Blackmun, J.

Circulated: 5/20/74

Recirculated: _____

# SUPREME COURT OF THE UNITED STATES

No. 72-1517

Georgia Theresa Gilmore et al., Petitioners, *v.* City of Montgomery, Alabama, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1974]

MR. JUSTICE BLACKMUN, memorandum.

The present phase of this prolonged litigation concerns the propriety of a federal court's enjoining a municipality from permitting the use of public park recreational facilities by private segregated school groups and by other non-school groups that allegedly discriminate in their membership on the basis of race. We granted certiorari to consider this important issue. 414 U. S. 907 (1973).

## I

Petitioners are Negro citizens of Montgomery, Alabama. In December 1958, now over 15 years ago, they instituted this class action to desegregate Montgomery's public parks. The defendants are the city, its Board of Commissioners and the members thereof, the Parks and Recreation Board and its members, and the Superintendent of the Parks and Recreational Program.

By their original complaint, the petitioners specifically challenged, on Fourteenth Amendment due process and equal protection grounds, a Montgomery ordinance (No. 21-57, adopted June 4, 1957) which made it a misdemeanor, subject to fine and imprisonment, "for white and colored persons to enter upon, visit, use or in any way

May 28, 1974

Dear Bill:

Re: No. 72-1517 - Gilmore v. City of Montgomery

I have had a request from Lewis and Potter regarding the third from the last full sentence and accompanying citation on page 14. They would like to have that sentence and citation replaced with the enclosed material. I shall accommodate them and wanted you to know of this without the delay that a rerun of the Print Shop occasions.

Sincerely,

HAB

Mr. Justice Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 28, 1974

Dear Lewis:

Re: No. 72-1517 - Gilmore v. City of Montgomery

I am glad to accommodate you and Potter with respect to the rider you propose to replace the third from the last full sentence and accompanying citation on page 14. I would like, however, to change the final phraseology, after the word "predicated," to read "upon a proper finding of state action." This, I believe, is consistent with the context and, perhaps, is a stronger standard. A copy of the rider as so changed is enclosed.

I shall have this rerun by the printer.

Sincerely,

Harry

Mr. Justice Powell

cc: Mr. Justice Stewart

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: Blackmun, J.

# SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: 5/25/74

No. 72-1517

| | |
|---|---|
| Georgia Theresa Gilmore et al., Petitioners, *v.* City of Montgomery, Alabama, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. |

[May —, 1974]

MR. JUSTICE BLACKMUN, memorandum.

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June 4, 1974

Re: No. 72-1517 - Gilmore v. City of Montgomery

Dear Byron:

I have not overlooked your note of May 23. After carefully considering it, I am inclined not to make the positive statement you suggest because the nonexclusive uses are many and varied, and all such uses by school groups would not necessarily be proscribable, at least without a well-developed record. In addition, inasmuch as there is now a "court," I, as you usually are, am hesitant to rock the boat.

Sincerely,

HAB

Mr. Justice White

June 4, 1974

Dear Bill:

Re: No. 72-1517 - Gilmore v. City of Montgomery

Thank you very much for your helpful letter of May 28. I have given it earnest consideration, having in mind, as I mentioned to you by telephone, that there is a "court" and that what changes I make must now meet with the approval of those who have joined.

The new draft incorporates, I believe, a good bit of what you have suggested. Specifically:

1. I have adopted your suggestions 2 and 5. In connection with No. 5, I have added, as a new footnote 6, on pages 6-7, the decretal provisions of the District Court judgment as set forth in 337 F. Supp., at 26.

2. Your suggestion No. 3 has been incorporated in part in the material added on page 17 and the accompanying footnote 10.

3. I am hesitant about suggestion No. 4, both because I think one or two of my "joinees" would be opposed and, more importantly, because I would prefer to await a better developed set of facts.

4. I have incorporated some of your factual material as marked and in footnotes 1 and 6.

In any event, let me have your reactions to the present draft. I doubt if we are very far apart in substance, and certainly this is the kind of case where the greater unanimity we have on the Court, the better.

Thank you again for your helpful suggestions.

Sincerely,

HAB

Mr. Justice Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 4, 1974

Re: No. 72-1517 - Gilmore v. City of Montgomery

Dear Chief, Potter, Lewis and Bill:

Bill Brennan has expressed a desire to join, but has suggested a number of changes. Some of these are readily acceptable. I am hesitant about others. In an attempt to accommodate Bill, I have incorporated a number of his suggestions in the current draft. I believe these will be acceptable to you, but if they are not, please let me know.

Sincerely,

H.A.B.

The Chief Justice
Mr. Justice Stewart
Mr. Justice Powell
Mr. Justice Rehnquist

Changes as marked

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

From: Blackmun, J.

Circulated: _____

Recirculated: 6/4/74

4th DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 72-1517

Georgia Theresa Gilmore et al., Petitioners, *v.* City of Montgomery, Alabama, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1974]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The present phase of this prolonged litigation concerns the propriety of a federal court's enjoining a municipality from permitting the use of public park recreational facilities by private segregated school groups and by other non-school groups that allegedly discriminate in their membership on the basis of race. We granted certiorari to consider this important issue. 414 U. S. 907 (1973).

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

From: Blackmun, J.

Circulated: _____

Recirculated: 6/6/74

pp. 10, 17, 18

5th DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 72–1517

Georgia Theresa Gilmore et al., Petitioners, *v.* City of Montgomery, Alabama, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1974]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 12, 1974

Re: No. 72-1517 - Gilmore v. City of Montgomery

Dear Chief, Potter, Lewis and Bill:

I enclose for your "pre-print" consideration a footnote which might be added at the end of the paragraph on page 13 of the opinion. I was inclined to feel that something like this was indicated in mild response to the two concurring opinions. Please let me know if you feel it should be used.

Sincerely,

Harry

The Chief Justice
Mr. Justice Stewart
Mr. Justice Powell ✓
Mr. Justice Rehnquist



_/ The Brethern in concurrence state that they would sustain the District Court insofar as any school-sponsored or directed uses of the city recreational facilities that enable private segregated schools to duplicate public school operations at public expense. It hardly bears repetition that the District Court's original injunction swept far beyond these limits without the fact finding required for the prudent use of what would otherwise be the raw exercise of a court's equitable power.

It is by no means apparent, as our Brother Brennan correctly notes, which uses of city facilities in common with others would have "a significant tendency to facilitate, reinforce, and support private discrimination." Norwood v. Harrison, 413 U.S. 455, 466 (1973). Moreover, we are not prepared, at this juncture and on this record, to overlook the standing of these plaintiffs to claim relief against certain nonexclusive uses by private school groups. The plaintiffs in Norwood were parties to a school desegregation order and the relief they sought was directly related to the concrete injury

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 12, 1974

MEMORANDUM TO JUSTICES DOUGLAS, BRENNAN, WHITE AND MARSHALL

Re: No. 72-1517 - Gilmore v. City of Montgomery

The enclosed is a copy of a new footnote 10 I am adding at the end of the paragraph that ends on page 13 of the opinion. I give this to you now because I do not know the length of any delay in the Print Shop.

Harry

[6/]

The Brethern in concurrence state that they would sustain the District Court insofar as any school-sponsored or directed uses of the city recreational facilities that enable private segregated schools to duplicate public school operations at public expense. It hardly bears repetition that the District Court's original injunction swept far beyond these limits without the fact finding required for the prudent use of what would otherwise be the raw exercise of a court's equitable power.

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properly developed record, it is not clear that every nonexclusive use of city facilities by school groups, unlike their exclusive use, would result in cognizable injury to these plaintiffs. The District Court does not have carte blanche authority to administer city facilities simply because there is past or present discrimination. The usual prudential tenets limiting the exercise of judicial power must be observed in this case as in any other.

M f. 13

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

From: Blackmun, J.

Circulated:

Recirculated: 6/13/74

6th DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 72-1517

| | |
|---|---|
| Georgia Theresa Gilmore et al., Petitioners, *v.* City of Montgomery, Alabama, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. |

[June —, 1974]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

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By their original complaint, the petitioners specifically challenged, on Fourteenth Amendment due process and equal protection grounds, a Montgomery ordinance (No. 21-57, adopted June 4, 1957) which made it a misdemeanor, subject to fine and imprisonment, "for white and colored persons to enter upon, visit, use or in any way

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 19, 1974

No. 72-1517 Gilmore v. City of Montgomery

Dear Bill:

Potter's note to you of this date, reminds me that I too have wanted to let you know that I will await Harry Blackmun's circulation.

As you know from my remarks at Conference, I cannot go along with the portion of Judge Johnson's order which would deny any "segregated group" - however small and however unrelated either to the past litigation over the parks or the schools - the privilege of using public parks and recreational facilities with other taxpayers in common. Indeed, I simply cannot recall an order in any case as far reaching and as prejudicial to the rights of individuals, as this one seems to me to be.

Perhaps I do not understand it, and so I am awaiting all circulations before I come to rest.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 28, 1974

No. 72-1517 Gilmore v. Montgomery

Dear Harry:

I am now with you on your memorandum as recirculated today.

Sincerely,

Mr. Justice Blackmun

CC: The Conference

LFP/gg

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 6, 1974

No. 72-1517 Gilmore v. Montgomery

Dear Harry:

I am still with you.

Sincerely,

Mr. Justice Blackmun

lfp/ss

cc: The Conference

June 12, 1974

No. 72-1517 Gilmore v. Montgomery

Dear Harry:

Your proposed footnote looks fine to me.

Sincerely,

Mr. Justice Blackmun

lfp/ss

cc: The Chief Justice
Mr. Justice Stewart
Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 28, 1974

Re: No. 72-1517 - Gilmore v. Montgomery

Dear Harry:

Please add my name to those who have indicated they agree with the memorandum you have prepared in this case.

Sincerely,

WHR

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 12, 1974

Re: No. 72-1517 - Gilmore v. City of Montgomery

Dear Harry:

I not only feel that the proposed footnote circulated in your memorandum of June 12th should be used, but I most heartily endorse both its felicitous phrasing and its sound substance.

Sincerely,

WHR

Mr. Justice Blackmun

Copy to: The Chief Justice
Mr. Justice Stewart
Mr. Justice Powell

Attached to WHR 6-12-1974
72-1517

P.S. to HAB's join. For him only.

I am indeed loath to suggest corrections to an acknowledged master of English usage, but since it has been said that even Homer nodded, I offer the following:

(a) Would not the deletion of the word "that" in the third line of the first paragraph make the sentence more grammatical?

(b) In the sentence beginning with the word "moreover" in the second paragraph on the first page, doesn't ~~xxxxxxxxxx~~ "assume" come closer than "overlook"?

Nitpickingly,

W.H.R.

Gilmore memo--to HAB--
Copies w/o P.S. to C.J., PS and LFP.